86-800

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

EDUARDO M. LUCERO, et al.,

Appellant,

v.

OFFICERS JAMES "BUSTER" SNYDER et al.,

Appellees.

On Appeal from the
United States Court of Appeals
for the Tenth Circuit

JURISDICTIONAL STATEMENT

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November 6, 1986

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(a) QUESTIONS PRESENTED BY THIS APPEAL

1. Whether any evidence of negligence on the part of Appellants was presented in the trial?

2. Whether the negligence instruction given to the jury was plain error?

3. Whether the jury's verdict was supported by the evidence?

4. Whether the verdict constitutes plain error?

5. Whether this case merits the closest and most exacting judicial scrutiny because it involves First Amendment rights which are fundamental freedoms?

6. Whether this case merits the closest and most exacting judicial scrutiny because Appellants are members of the national origin ethnic minority group known as Chicanos, and they are a suspect classification?

7. Whether appellees' actions on June 28, 1981 amounted to prior restraints on appellants' freedoms of speech, press, assembly, association, expression, and liberty?

8. Whether appellees' acts on June 28, 1981 have had a chilling effect on Chicano political speech in Denver's North side neighborhood?

9. Whether the newly discovered evidence regarding ex-Officer James "Buster" Snyder's violent behavior merits a new trial?

10. Whether the appellants who were minor children on June 28, 1981 could have been negligent as a matter of law?

11. Whether any negligence could be imputed to the appellants who were minor children seven years of age or younger?

12. Whether defense counsel wrongful-

ly influenced the jurors at their subconscious level by repeatedly showing them a doctored video tape?

13. Whether defense counsel's behavior resulted in an obstruction of justice in violation of 18 U.S.C. § 1503?

14. Whether the trial judge's behavior in stepping down from the bench to join the jurors in viewing defense counsel's "doctored" video tape gave his official approval of said tape, and defense counsel's misconduct before the jury?

15. Whether the trial judge violated 18 U.S.C. § 1503 by conducting himself as stated in number 14 above?

16. Whether the trial judge committed embracery of the jury by his conduct as described in number 14 above?

17. Whether the trial judge was biased against the appellants on the basis of their ethnicity and national origins?

18. Whether the trial judge permitted defense counsel's physical harassment and intimidation of a witness on the stand?

19. Whether the trial judge wrongfully took the case from the jury by rejected the jury instructions submitted by both parties and writing his own jury instructions, thereby controlling the outcome of the trial, and committing "embracery of the jury"?

20. Whether the trial judge was physically unable to manage the trial because he had a cold, and because he was under tremendous stress and pressure?

(b) LIST OF PARTIES

VALERIE GONZALES, RUDOLPH GONZALES, Jr., RODOLFO GONZALES, GERALDINE GONZALES, ARTURO RODRIGUEZ, TULAROSA RODRIGUEZ, ANGELITA RODRIGUEZ, CHARLOTTE RODRIGUEZ, ELAINE SALAZ GONZALES, CELESTINA SALAZ, CAMILA SALAZ, LETICIA GONZALES, VAN LUCERO, GAIL LUCERO, MONSITA LUCERO, TEOFILIO LUCERO, RODOLFO LUCERO, ESTANISLADO ALEMAN, INDALESIA GONZALES, GINA ALVARADO, EDUARDO M. LUCERO, EDUARDO D. LUCERO, MARY LUCERO, NITA GONZALES,

Appellants

v.

OFFICERS JAMES "BUSTER" SNYDER (AKA SNIDER), GORDON CHRISTOPHER, CHESTER BRANNON, DAVID BRICKER, DANIEL REED, LESLIE L. JENKINS, LESLIE C. GEBHARDT, RICHARD FISHER, and THOMAS COOGAN, Chief of Police of the City and County of Denver, and the CITY AND COUNTY OF DENVER,

APPELLEES.

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N.A.A.C.P. v. Button, 371 U.S. 415 (1963)

Sixteenth of September, Etc. v. City of Denver, 474 F. Supp. 1333 (D.C. Colo. 1977).

Ward v. Werner, 61 F.R.D. 639 (1974)

Williams v. Spencer, 455 F. Supp. 205 (1978)

414 Theater Group v. Murphy, 499 F. 2d 1155 (2d Cir., 1974)

(iii) The statutory provision that confers jurisdiction of this Appeal on this Court is 28 U.S.C. § 1252.

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THE PROTOCOL OF QUERETARO

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JURISDICTION

(e) (i) 42 U.S.C. § 1983

The jurisdiction of this Court is invoked pursuant to the provisions of 42 U.S.C. § 1983. Appellees' conduct in assaulting appellants was official City of Denver action, therefore, it was state action. Appellees were on duty, they were armed and in uniform, and they were carrying out the orders of their superior officers.

Appellees' activities were based on their racial policies of invidious discrimination against appellants.

FIRST AMENDMENT

The jurisdiction of this Court is invoked pursuant to the provisions of the First Amendment to the United States Constitution. Appellees' actions prevented appellants' speech, broke up their assembly and association, and amounted to pr-

ior restraints on their rights of free speech, press, assembly, association, expression, and liberty.

FOURTH AMENDMENT

The jurisdiction of this Court is invoked pursuant to the provisions of the Fourth Amendment to the United States Constitution. Appellees' conduct in assaulting appellants violated appellants' rights to be secure in their persons.

FOURTEENTH AMENDMENT

The jurisdiction of this Court is invoked pursuant to the provisions of the Fourteenth Amendment to the United States Constitution. Appellees made and enforced the two city ordinances which abridged the privileges and immunities of appellants, who are citizens of the United States. Appellees' actions in assaulting appellants deprived appellants of their liberty without due process of the laws, and thereby denied appellants the equal protection of the laws.

THE TREATY OF GUADALUPE HIDALGO

The jurisdiction of this Court is invoked pursuant to the provisions of the Treaty of Guadalupe Hidalgo.

Appellants are the descendants of the Mexican citizens who were "incorporated into the Union of the United States" by operation of Article IX of the Treaty of Guadalupe Hidalgo, and appellants' rights as citizens of the United States derive from that treaty. See Appendix 43.

Article IX of the Treaty of Guadalupe Hidalgo provides that appellants are entitled:

> "To the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution."

(ii) The Tenth Circuit Court of Appeals dismissed this case on July 3, 1986. See Appendix 35. The Notices of Appeals were filed in the Tenth Circuit Court of Appeals, and copies were mailed to this Court on July 24, 1986. See Appendix 40.

(g) STATEMENT OF THE CASE

INTRODUCTION

This case, known popularly as the "La Raza Park Lawsuit", is a case of brutal punishment of the Chicano community for having exercised their First Amendment rights of free speech, press, assembly, association, expression, and liberty in a public park.

The City of Denver invited the public, including Appellants, to attend and participate in the eleventh annual La Raza Park opening to be held at La Raza Park on Sunday, June 28, 1981, and then attacked them with vicious attack dogs, riot clubs, and tear gas. On Sunday, June 28, 1981, the weather was warm and sunny, with a few scattered clouds. The park was full of people of all ages. Some children were swimming in the pool while others were

eating burritos and enjoying an atmosphere of relaxation and enjoyment. Other people were listening to music, watching dance performances, and listening to political speakers.

THE FIRST PRIOR RESTRAINT

It rained lightly for a little while, then the sun came out again. At about three o'clock a police officer arrived and shouted "I have declared this an unlawful assembly, you have 5 minutes to leave the park, or we will remove you with gas." The police officer then left. A few minutes later, the police forces dressed in combat gear came marching toward the park from the East and Southeast. On West 39th Avenue, police officers were marching in the middle of the street in a wedge-type riot formation with dogs, clubs, gas masks, and full riot gear. The police formation marched into the park and moved all of

the people out of the north side of the park and across the street against the fences and buildings. There was no resistence or provocation and the people left the park peacefully without incident.

THE SECOND PRIOR RESTRAINT

The police officers waited for a short period of time, then announced that "now we are going to clear the sidewalks", as they opened fire with tear gas projectiles aimed at waist level from short rifles.

Appellants were unarmed and up against the buildings and fences. They could only move in two directions, with tear gas and vicious attack dogs in both of those directions.

Appellants were trapped, with the police line in front, and the fences and buildings behind, the police forces effecvely forced people to flee toward their dogs and then attacked them from every direction.

At one point in time during seven wild hours, police officers were seen carrying heavy calibre automatic rifles with banana magazines. The only reason no one was shot was due to the presence of television cameras which were also running throughout the neighborhood.

The situation was hopeless, unarmed people against police forces with dogs, tear gas, riot clubs, and automatic rifles. People began roaming around the neighborhood, dazed and blinded by the tear gas, and the police attacked them again and again with dogs, and clubs, and more tear gas.

By this time the police had gone berserk they were in a frenzy with no apparent command structure, they appeared to be high on drugs; as if they were enjoying themselves. For the next four hours the police forces scattered out and roamed the Chicano neighborhood surrounding the park . . . randomly beating on people and turning their vicious dogs loose on children.

During these wild hours, police with dogs ran rampant all over the North side Chicano neighborhood shouting obscenities, racial epithets, and randomly beating Chicanos while smiling and laughing ... as if they were feeling some kind of personal satisfaction and enjoyment with what they were doing.

THE PARTIES

APPELLANTS

The appellants are the Chicano descendents of the Mexican citizens who were incorporated into the United States by operation of the Treaty of Guadalupe Hidalgo in 1848. See Appendix 43

APPELLEES

The appellees are the Mayor and appointed law enforcement officials who have inherited and perpetuated the the racial policies of the Ku Klux Klan:

"In 1923 Benjamin Stapleton

was elected Mayor of the City of Denver.

Stapleton named William Candlish as Denver's new Chief of police in return for Klan support. Candlish was a former newspaper editor, state senator, and radium experimenter with no previous police experience. His only qualifications were his Klan membership and his subservience to Locke. Police Chief Candlish made the department an instrument of the Klan's will. Candlish asked all Protestant policemen to fill out Klan Membership applications; those who accepted were rewarded with choice assignments, shorter hours, and promotions. The rest joined Jewish and Catholic police officers working night shifts on undesirable beats. Candlish's men began enforcing forgotten city ordinances to harass Jewish and Catholic shopkeepers. More frightening was a Candlish edict, based upon an old Denver law, prohibiting Greek, Chinese, Mexican, and Black businessmen from employing white women. The Klan was so sure of its control that it even requisitioned men and vehicles from the department.

Mayor Stapleton named fellow Klansman Rice Means as Manager of Safety and later City Attorney. Rueben Hershey succeeded Means as Manager of Safety after first serving as Manager of Revenue. Klansmen filled the offices of Clerk and Recorder, Manager of Improvements and Parks, and City Accountant, among others. The police Department was heavily infiltrated, with seven sergeants and dozens of policemen, all card carrying Klansmen."

Reprinted from Hooded Empire: The Ku Klux Klan in Colorado, 1921-1932, by Robert Allen Goldberg, 1977, Xerox University Microfilms, Ann Arbor, Michigan, at page 43.

PROCEEDINGS BELOW

a. The Trial

This action was filed by 51 individual plaintiffs in the District Court for the City and County of Denver, State of Colorado, and was removed by the defendants to the United States District Court for the District of Colorado.

The case was tried to a jury and lasted three weeks. The opinion is published at 599 F. Supp. 1460.

Judge Kane dismissed counts 1 and 2 on Directed Verdicts, and the jury found for the plaintiffs on the conspiracy count. The jury, however, also found that the plaintiffs were contributorily negligent, thus denying them damages.

JUDGE KANE'S BIAS

The goals of the Federal District Court for the District of Colorado and counsel for both parties were to reduce the numbers of plaintiffs, reduce the claims of the plaintiffs, and to deny plaintiffs money damages.

Appellants' case was deliberately sabotaged by their own attorneys; defense counsel engaged in reprehensible misconduct; and Judge Kane took the case from the jury.

Judge Kane's control of the litigation led to the complete breakdown of the judicial system. Judge Kane allowed defense counsel's misconduct, and manifested his official approval of such misconduct.

Judge Kane should have declared a mistrial because he was fully aware of the many mistakes plaintiffs' counsel were making. Judge Kane should

have declared a mistrial when he rejected the jury instructions tendered by both parties. when Judge Kane chose to write his own jury instructions, he effectively took the case from the jury.

Judge Kane allowed defense counsel to physically harass and intimidate plaintiff Judy Montero on the witness stand by placing his mouth directly in front of her face and shouting loudly from as close as one to three inches from her face.

Judge Kane not only permitted defense counsel's repeated showings of his "doctored" video tape to the jury, thereby affecting the jurors' sensory perceptions, but he stepped down from the bench, walked over to the jury box, and joined the jury in viewing the video tape, thereby giving his official

approval of the video tape, and encouraged defense counsel's misconduct in the jurors' presence. Judge Kane's conduct during the trial amounted to an "embracery of the jury."

Post Trial Motions

Plaintiffs filed a "pro se" Motion For a New Trial and their former attorneys filed Motions For a New Trial and for Judgment Notwithstanding the Verdict. These motions were all denied.

Appellants fired their attorneys and then individually filed timely Notices of Appeals in the United States District Court for the District of Colorado.

The Appeal

Of the 51 plaintiffs who filed this action in the District Court, 41 filed timely Notices of Appeals.

The United States Court of

Appeals for the Tenth Circuit dismissed all appellants who had not indidually paid the filing and docketing fees, thereby reducing the number of appellants.

On July 3, 1986, the Tenth Circuit of Appeals dismissed the remaining appeals for failure to order the $6,000.00 transcript of the trial or to agree to a statement of the evidence or the record. See Appendix 35.

This case has been briefed. Appellants submitted an opening brief and a reply brief. Appellees, however, submitted a one paragraph brief:

"Defendants-Appellees have moved to dismiss the case because Appellants have not ordered a transcript nor has any set of facts been stipulated to by the parties. Appellees Motion To Dismiss was sent to the Court on December 26, 1985. Appellees hereby offer their Motion To Dismiss as their brief on the grounds that because no record is before the Court, there is nothing that Appellees may brief."

Appellees also submitted a one page Supplement to their brief:

"As noted previously in Appellees' brief, Appellees have moved to dismiss the case because Appellants have not ordered a transcript. Pursuant to F.R.A.P. 24(a), the Appellants were required to apply to the district court for leave to proceed in forma pauperis. Some of the above Appellants have made such application. In response to this application, the district court judge has found that "[t]here is no merit to the appeal" of any of the plaintiffs below. See attached Order filed January 13, 1986. Under 28 U.S.C. §1915 (a), "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing it is not taken in good faith. Appellees respectfully submit that the district court's ruling is applicable to all plaintiffs, finds that the appeals are not taken in good faith."

Appellees did not respond to appellants' briefs because to do so, they would have had to admit that they were guilty of at least the first prior restraint, which occurred when appellees forcibly moved appellants out of the park and across the street.

There is no dispute as to the first prior restraint.

The Tenth Circuit Court of Appeals dismissed 21 appellants for failure to pay the docket fees, and then dismissed the remaining appellants for failure to pay $6,000.00 for the trial transcript.

Appellants submit that they are being denied access to the courts on the basis of their poverty.

The test is whether the burden of paying fees or giving security for costs would interfere with the ability to provide the "necessities of life" for the litigant and his dependents. Williams v. Spencer, 455 F. Supp. at 208.

In McTeague v. Sosnowski, 617 F. 2d 1016, (3d Cir., 1980), the court, citing Adkins v. E.I. DuPont de Nemours & Co., Inc., 335 U.S. 31 (1948), held

"Since 1892, when the predecessor to 28 U.S.C. § 1915 was enacted, Citation omitted) the doors of the federal courts have been open to the poor and the rich alike. Under this statute an indigent individual may initiate a claim or defend his life or property, without an obligation to pay the court costs that most parties must bear, and and in some instances with the assistance of court appointed counsel. With § 1915 Congress has guaranteed 'that no citizen shall be denied an opportunity to commence, prosecute, or defend an action...solely because his poverty makes it impossible for him to pay or secure the costs' of litigation. Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331 (1948)."

Poverty to qualify under § 1915 does not require penniless destitution. Ward v. Werner, 61 F.R.D. 640.

In Adkins, supra, the District Court construed the affidavits as showing no more than hardship, Justice Black wrote for a unanimous court: "We canot agree with the court below that one must be be absolutely destitute to enjoy the benefit of the statute. We think that an affidavit is sufficient which states that one cannot because of his poverty pay or give security for the costs . . . and still be able to provide himself and dependents 'with the necessities of life.' To say that no persons are entitled to

> the statute's benefit until they have sworn to contribute to [the] payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs for a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more dssirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself destitution."

Adkins v DuPont, supra, at 335 U.S. 330-340.

Appellants in this particular case do not have $6,000.00 to pay for the trial transcript, however, they do have a meritorious claim for deprivation of their First Amendment freedoms at the hands of appellees.

(h) THE QUESTIONS PRESENTED HEREIN ARE SUBSTANTIAL QUESTIONS REGARDING THE MOST FUNDAMENTAL FREEDOMS OF SPEECH, PRESS, ASSOCIATION, ASSEMBLY, EXPRESSION, AND LIBERTY

These questions are substantial enough to merit the plenary consideration of this Court with briefs and oral argument.

The right to free speech is so inherently vital to full citizenship as to vest one asserting its infringement with standing on the basis of having irreparable injury. 815 Foxon Rd., Inc. v. Town of East Haven, Connecticut, 605 F. Supp. 1151 (D.C. Conn., 1985).

The loss of First Amendment rights itself constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347 (1976); 414 Theater Group v. Murphy, 499 F. 2d 1155 (2d Cir., 1974).

Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent

lawless action. DeJonge v. Oregon, 299 U.S. at 364.

Protection of political expression is at the very heart of the purpose of the First Amendment. Sixteenth of Sept., Etc. v. City of Denver, 474 F. Supp. at 1333 (D.C. Colo., 1977).

A regulation impacting negatively on the exercise of a First Amendment right is presumptively invalid. Bantam Books v. Sullivan, 372 U.S. 58

CONCLUSION

This is a civil action for deprivation of these fundamental freedoms. appellees deprived appellants of their rights of free speech, assembly, press, association, expression, and liberty based upon the enforcement of two Denver city ordinances. Appellees used the two constitutionally infirm city ordinances as a pretext to prevent

appellants' speech regarding police brutality, education, human and civil rights, self determination, pseudo-apartheid, war, and political awareness.

Appellees effectuated two prior restraints on appellants' exercise of free speech by assaulting them and preventing their speech from reaching their intended audience. Appellees also assaulted the intended audience and prevented them from receiving the speech they had gone to La Raza Park to hear.

THE DENVER CITY ORDINANCES

The Denver City Ordinance which requires a permit for an assembly of 25 or more persons in a public park is a direct prior restraint upon Chicano citizens because Chicano families are extended families often numbering more

than 25 persons.

The Denver City Ordinance which requires a permit for an amplifier is so broad and vague that even a small child with a hand held transistor radio would be violating the ordinance, and thus subject to brutal assault and arrest by Appellees.

A statute or city ordinance broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however even handed its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Chicano citizens. See N.A.A.C.P. v. Button, 83 S. Ct. at 340.

Municipalities may regulate land use, but they may not regulate the exercise of First Amendment rights. Moore v. City of East Cleveland, 431

Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. (1932).

For the foregoing reasons, appell- respectfully pray that the dismissals of their appeals be reversed, and that their case be remanded for a trial on the merits.

Respectfully submitted,

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* * *

APPENDIX

APPENDIX

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

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599 F. Supp. 1459,
(D.C. Colo., 1984)

ROBERTO LUERA, et al., Appellants

vs.

JAMES "BUSTER" SNYDER, et al., Appellees

ORDER ON POST TRIAL MOTIONS

KANE, District Judge.

Plaintiffs filed this action alleging that: 1) defendants violated their rights under 42 U.S.C. § 1985 by conspiring to use excessive force to disperse a community gathering in the City and County of Denver at Columbus Park, popularly known as La Raza Park; and, 2) that the plaintiffs were damaged by the defendants' negligent planning for the opening of the park and by the defendants' negligent response to and dispersal of the gathering.

After a three week trial, a jury found in favor of defendants Fisher, Snyder, and Coogan on the conspiracy claim. On the negligence claim, the jury found that the plaintiffs and defendants were equally negligent. Under Colorado's comparative negligence statute, C.R.S. 13-21-111(1), the plaintiffs recover no damages.

The following motions are before me: 1) plaintiff's motion for judgment notwithstanding the verdict; 2) plaintiff's motion for a new trial which was filed and signed by the plaintiffs' attorneys, Gerash and Robinson, P.C.; 3) plaintiffs' "pro se" motion for a new trial; 4) a supplement to the "pro se" motion for a new trial , which alleges the discovery of new and material evidence; and, 5) a motion by plaintiffs'

counsel a claimed attorneys' lien

I. MOTION FOR JUDGMENT NOTHWITHSTANDING THE VERDICT

[1] Plaintiffs move for the entry of judgment in favor of the plaintiffs under eight years of age, notwithstanding the jury's verdict against all of the plaintiffs. Plaintiffs, citing Roberts v. Fisher, 169 Colo. 288, 455 P. 2d 871 (1969), contend that individuals under the age of eight cannot be found negligent, and therefore the jury's verdict, that those plaintiffs under eight years of age were fifty percent, cannot stand.

Plaintiffs did not move for a directed verdict on this issue at the close of the evidence. The plain meaning of Rule 50(b) of the Federal Rules of Civil Procedure is that a

motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence; see Wright & Miller, Federal Practice and Procedure: Civil § 2537 at 596 (1971). Because the plaintiffs' attorneys did not move for a directed verdict on this issue, I deny the motion for entry of judgment notwithstanding the verdict.

II. PLAINTIFFS' MOTION FOR A NEW TRIAL

This motion for a new trial, filed by plaintiffs' attorneys, asserts that I made 22 errors. The motion contains one citation of authority. In contravention of Rule 408(A) of the Local Rules of Practice for this district, the motion fails to cite the section in the Federal

Rules of Civil Procedure under which the movant requests relief. Despite these not insignificant shortcomings, I will address the 22 contentions: I have divided them into the following categories: A) evidentiary rulings; B) jury selection; C) jury instructions; and, D) directed verdicts and motions to amend.

A. EVIDENTIARY RULINGS

(2) Plaintiffs contend that it was error not to allow Denver's mayor, Federico Pena, to testify about the Park incident and about a letter he wrote to Wilma Martinez recommending that this lawsuit be filed. Mayor Pena was a state legislator at the time of the incident and when he wrote the letter. This issue was ruled on in limine; my ruling then

and now, is that because the mayor has no personal knowledge of the incident, he was not competent to testify. Mayor Pena's April 26, 1984 affidavit, at paragraph 3, states that he "... was not in Denver during the occurance of such events," and that "Any information [he] received concerning such events was either through constituents or other second hand sources." The plaintiffs have not produced any evidence that belies my finding that Mayor Pena's proposed testimony and his letter to Wilma Martinez are inadmissible. I conclude that both were properly excluded.

Plaintiffs also contend that I erred by not permitting Art Dill, Eldon Caldwell and Leslie Gebhardt to testify.

Gebhardt was dismissed as a def-

endant in the case on the first day of trial because the plaintiffs' attorneys failed to serve him with process. Despite my ruling on the fourth day of trial that the plaintiffs could call Gebhardt to testify, they did not call him. Plaintiffs' apparent tactical decision not to call Gebhardt cannot impute error to the court.

[3] I refused to allow the plaintiffs to call Dill and Caldwell. Their proposed testimony of changes made in police department policies after the incident is not admissible because of the public policy of encouraging subsequent remedial measures. See Rule 407 of the Federal Rules of Evidence. If plaintiffs were permitted to use such potentially damning evidence, remedial measures which are to the benefit of the public at large might be forgone by defendants

afraid of the prejudicial effect such evidence would have in lawsuits.

Likewise, plaintiffs contend that I erred when, after permitting defense counsel to cross-examine Digrazia, an expert witness, concerning feasible changes in Denver's policy of issuing summonses and citations to organizers of potentially volatile gatherings in a city park, I sustained objections to plaintiffs' counsel' attempt to examine him on re-direct concerning the actual implementation after the incident of any such changes within the Denver Police Department. Cross-examination regarding the feasibility of policy changes does not open the door, on redirect, to testimony concerning implementation of new policy. Digrazia did not contest the feasability of instituting such policy changes.

Therefore, evidence of actual implementation of policy changes is inadmissible as irrelevent and as evidence of a subsequent remedial measure prohibited by Federal Rule of Evidence 407.

[4] Plaintiffs further contend that because I allowed the defendants to introduce station KUSA's videotape of the incident, my refusal to admit station KCNC's and station KMGH's videotape of the incident was error. Plaintiffs, however, neglected to include KCNC's and KMGH's videotapes in the pre-trial order whereas the defendants did include KUSA's videotape. In fact, plaintiffs' counsel were the first to list KUSA's videotape as an exhibit. Federal Rule of Civil Proc-16(e) states that the pre-trial order " ... shall control the subsequent course of the action unless modified

by a subsequent order," and that the pre-trial order shall be modified only to prevent "manifest injustice." Although I don't doubt the plaintiffs' case would have been stronger had it been more fully documented, their own failure to comply with the rules of civil procedure can hardly create "manifest injustice." Counsel for defendants clearly had the right to rely on the pre-trial order. An eleventh hour effort to endorse such exhibits would have precluded adequate preparation by defendants in order to correct demonstrably inadequate preparation by plaintiffs. They would have needed more time to study the videotape before trial. I conclude that the plaintiffs' motion in limine to exclude the KUSA's videotape was properly denied and that KCNC's and KMGH's videotapes were properly

excluded. Parenthetically, each broadcast station had the right to notice and a hearing to seek protective orders concerning "take-outs" and the scope of subpoenae duces tecum.

B. Jury selection

Plaintiffs contend that I ruled erroneously: 1) that attorney-conducted voir dire be limited to 20 minutes per side; that 2) prospective juror that Danalek could not be excluded for cause and; 3) that the empaneled jury would not be stricken despite plaintiffs' allegation that the defendants used their ". . . peremtory [sic] challenges for the purpose of striking all minorities and/or spanish [sic] surname jurors."

[5-7] 1. The court's discretion to control the length of attorney-conducted voir dire is not abused unless the parties are prevented from effectively

exercising peremptory and cause challenges. Darbin v. Nourse, 66 F. 2d 11090, 1112-13 (9th Cir.1981). Plaintiffs' counsel did not object at trial to the time limitation. It is well settled that the federal trial court does not have to allow attorneys to conduct any voir dire at all. 1 /

---

1. I am perhaps overly sensitive to this particular challenge. The tradition of this court is to have the trial judge conduct the voir dire examination of jurors. I am quite comfortable with that tradition and believe it is demonstrable that most attorney-conducted voir dire needlessly wastes time, annoys jurors and creates confusion. It is frequently pointless and often pathetically maladroit.

   In the instant case, plaintiffs' most experienced counsel made an impassioned plea for permission to conduct the voir dire. After inundating me with canned briefs and a seemingly endless profusion of reprints of articles by psychologists, all of which I read and all of which lacked any genuine qualities. I was impressed by one point: He suggested that attorney conducted voir

dire examination would permit him to develop an intuitive sense of the jurors' subconscious predilictions in a case involving police and members of a minority group. I certainly couldn't, but I was anxious to see him try. Accordingly, I abandoned our tradition and ordered that the voir dire would be conducted jointly; first by the court and then by counsel for a period not exceeding twenty minutes per side

I anxiously awaited the opportunity to observe this titan of the subconscious at work. On the day of the trial, however, when the morning mists had been burnt from the battlefield and all was ready "to cry havoc and let slip the dogs of war," the champion of voir dire was nowhere to be found. He left the field and its burdens to two younger associates, one of whom conducted a woeful examination of less than the allotted twenty minutes. At least one thing was accomplished: Like a prodigal son, I have returned to tradition and think it highly unlikely that I will ever apostatize again--at least in the conduct of voire dire examination.

Rule 47(a), Fed.R.Civ. P.; Perry v. Allegheny Airlines, 489 F. 2d 1349, 1352 (2d Cir.1974). In addition to 20 minutes per side of attorney conducted voir dire, I examined the jur-

ors extensively.

[8,9] 2. The next contention is that Pat Danalek should have been excused from the jury for cause. However, unless the juror shows the actual existence of an opinion likely to raise the presumption of partiality, the juror need not be excused for cause Reynolds v. United States, 98 U.S. 145, 157, 25 L. Ed. 244 (1878). The plaintiffs did not demonstrate that this juror showed any such opinion. The plaintiffs not having demonstrated, now or during voir dire, that my denial of the challenge for cause was proper.

[10] 3. As to the charge that the defendants used their peremptory challenges to exclude minority jurors, a recent decision by the Florida Supreme Court offers a test for measuring the alleged discriminatory use of peremptory

challenges.

The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, the trial court must decide it there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. . . .State v. Neil, 457 So. 2d 481 (1984).

The plaintiff's attorneys made no such timely objection and have demonstrated only that two of the individuals peremptorily excused by defend-

ants were Spanish sur-named. One of those so challenged was a lawyer. The plaintiffs have not demonstrated a strong likelihood that the two jurors were challenged solely because of their race; I will not pursue a vapid accusation that they were. To do so would require a speculative inquiry into the subjective motives of defense counsel. See King v. County of Nassau, 581 F. Supp. 493 (E.D.N.Y. 1984). I find that the defendants did not use their peremptory challenges improperly.

C. Jury Instructions

[11] Plaintiffs contend that an instruction should have been given to the jury that children under eight years of age cannot be found negligent for purposes of weighing comparative negligence. Plaintiffs' attorneys, however, neglected to tender such an

instruction at the appropriate time. Rule 51 Fed.R.Civ.P. states that "... No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict ...." The plaintiffs, having made no such objection or tender may not now make this objection as a ground for a new trial. Obviously, I do not regard this matter as plain error. Plaintiffs' strategy, if such it can be called, was to focus on defendants' conduct. No evidence was presented or even offered by plaintiffs to show individual damage. There was no evidence of medical expenses or medical testimony of injury offered or presented.

Plaintiffs also contend that my refusal to provide the jury, during its

deliberations, with the ages of all the plaintiffs warrants a new trial. I do not agree. After hearing the arguments of counsel, I instructed the jury to rely upon its collective memory.

D. Directed Verdicts and Motions to Amend

Plaintiffs contend that directed verdicts were erroneously entered in defendants' favor. Plaintiffs state that directed verdicts were entered in favor of the defendants: 1) on plaintiffs' first claim for relief under 42 U.S.C. § 1983; 2) in favor of Denver on plaintiffs' fourth claim for relief under 42 U.S.C § 1985; and, 3) denying plaintiffs' claim for punitive damages.

[12] 1. After viewing all the evidence presented in the light most favorable to plaintiffs, Thompson v. Kerr-McGee, 660 F. 2d 1380, 1389 (10th

Cir.), cert denied, 455 U.S. 1019, 102 S. Ct. 1716, 72 L. Ed. 2d 137 (1981), I concluded that the evidence did not raise a contested issue of fact regarding defendants' liability under § 1983. Therefore, I entered a directed verdict in favor of defendants on that claim.

2. Regarding the plaintiffs' contention that the entry of a directed verdict in favor of Denver on plaintiffs' fourth claim for relief consituted error, in fact no such directed verdict was entered. Plaintiffs' allegation as to this ruling is simply erroneous.

3. Likewise, a directed verdict was never entered in favor of defendants on plaintiffs' claim for punitive damages. The claim for punitive damages was in the verdict forms presented to the jury.

III. PLAINTIFFS "PRO SE" MOTION FOR A NEW TRIAL

The plaintiffs' second motion for a new trial purports to be pro se; it is not, It is signed on behalf of all the plaintiffs by one of the plaintiffs, Eduardo M. Lucero. Although Lucero received the Juris Doctor degree in 1977 from the University of Denver College of law, he is not licensed to practice law in Colorado nor is he a member of the bar of this court. He is, however, employed in a quasi-legal position with the United States Department of Education as an Equal Employment Opportunity specialist. Accordingly, I will rule on the "pro se" motion fully aware it was drafted by an attorney.

A. Ineffective Assistance of Counsel

[13] In support of his motion for a new trial, Lucero's first contention

is that the ineffective assistance of plaintiff's counsel impaired the presentation of the plaintiffs' case to the jury. Lucero confuses this civil case with a Sixth Amendment based claim for the re-trial of a criminal case. Although the conviction of a criminal defendant who has not had effective assistance of counsel is repugnant to the Constitution, the civil litigant has no such constitutional bedding. What Lucero seems to be arguing is that the jury's verdict is too harsh a sanction on the plaintiffs; that but for the negligence of plaintiffs' counsel, the jury would have returned a plaintiffs' verdict. Lucero states that plaintiffs' counsel filed a poorly drafted complaint, failed adequately to preserve and catalog the evidence, failed to serve named defendants and failed to challenge the constitution-

ality of the city ordinances involved. Pro se Motion for new trial, at ¶2.

A new trial is not warranted based on the attorneys' poor handling of the case. The plaintiffs having "voluntarily chosed [these] attorney[s] as [their] representative in the action ... cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation in which each party is deemed bound by the acts of his lawyer agent and is considered to have 'notice of all facts, notice of which can be charged to the attorney.'" Link v. Wabash, 370 U.S. 626, 634-35, 82 S. Ct. 1386, 1390-91, 8 L. Ed. 2d 734 (1962) (Harlan, J.), citing Smith v. Ayer, 101 U.S. 320, 326, 25 L. Ed. 955 (1879).

The conscious acquiescence of a

party to his counsels' inaction is a factor weighing against affording relief to clients from the consequences of the inaction. Link v. Wabash, supra, at 634, 82 S. Ct at 1390. Moreover, where as here a plaintiff is himself an attorney, efforts of the client to excuse himself from the consequences of the attorney's nonfeasance are especially weak. Chira v. Lockheed Aircraft, 634 F. 2d 664 (2d Cir. 1980). In Chira the lawyer was, unlike Lucero, licensed to practice law. Lucero is employed, however, in a quasi-legal position in the field of civil rights with the D.O.E. and was present in court for almost all of the proceedings. I think it grossly unfair to visit the sins of the plaintiffs' attorneys upon the defendants who in defense of a second trial would be forced to spend additional thousands of

dollars and hours for yet another three week trial. If plaintiffs are so dissatisfied with the representation they received, it is more fitting and appropriate to examine the merits of their contentions in a suit against their counsel. Certainly their counsel deserve an opportunity to be heard. More to the point, opposing parties and opposing attorneys should not have to be the watchmen of their case and bear the risk of additional trials and expenses. Responsibility should flow from the act rather than attach itself to the chimerical and timeless notion of an ideal result. Succintly stated, the defendants did their job, the plaintiffs didn't. If, as the plaintiffs say, the fault lies with their own attorneys, then that is where they should look for relief.

B. Directed Verdict on the Third Claim for Relief

[14] Plaintiffs say that I should not have granted a directed verdict in favor of Denver on the third claim for relief. That claim alleged that defendant Denver, by decisions of its administrative officers and "through the implementation of formal and informal policies and customs of harassment antagonism, suppression, and disruption of the Chicano community" caused injury to plaintiffs, in violation of 42 U.S.C. § 1983. Third Amended Complaint at ¶14. Plaintiffs, however, failed to present any evidence suggestive of a city policy to harass the Chicano community. The granting of a directed verdict as to this claim was inescapable. See White v. Talboys, 573 F. Supp. 49, 50 (D. Colo. 1983).

C. Good Faith Defense

[15] Plaintiffs' third contention is that I committed plain error by instructing the jury that good faith is an affirmative defense to a § 1985 conspiracy claim. Conspiracy, they say, is itself a violation of § 1985. Because there was evidence both of an agreement to injure plaintiffs and an overt act causing injury, they argue that there can be no good faith defense because the result would be a good faith conspiracy.

In Pierson v. Ray, 386 U.S. 547, 555-57, 87 S. Ct. 1213, 1218-19, 18 L. Ed. 2d 288, 296 (1967), the court stated that good faith and probable cause are defenses available to police officers under § 1983. Defendants were entitled to have the jury instructed

on that defense. The jury was not required to find that the conspiracy's purpose was to injure. On the contrary, the defendants' evidence, apparently accepted by the jury, was that defendants planned and devised, in good faith, a scheme to enforce the law.

D. Inconsistent Verdicts

According to plaintiffs, the jury found on the negligence claim that defendant police officers did not act in good faith and this is inconsistent with the same jury's finding that the police acted in good faith on the conspiracy claim. This argument fails because the jury made no such finding. Denver was the only defendant on the negligence claim. The jury was not instructed that good faith was a defense to the negligence claim.

—INSTRUCTIONS ON CITY ORDINANCES

Plaintiffs object to all instructions referring to Denver city ordinances on grounds that plaintiffs did not, on the date of the incident, engage in any of the actions prohibited by these ordinances. The record of the case, however, contains evidence upon which a jury could properly base a finding that plaintiffs did violate the city ordinances and park rules which were contained in the jury instructions.

[16] Plaintiffs are also barred by Rule 51, Fed. R. Civ. P. from alleging that these instructions were given erroneously. Rule 51 States that "... No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the

jury retires,...stating distinctly the matter to which he objects and the grounds of his objection..." Rule 51 is not satisfied by the general objection plaintiffs' counsel made to the instructions on city ordinances. Plaintiffs counsel objected to the instructions as being unnecessary and cumulative. So general an objection does not meet Rule 51's requirements.

MISCONDUCT OF
DEFENDANTS' COUNSEL

[17] Plaintiffs allege that defense counsel engaged in the following misconduct during the trial; that defense counsel falsely quoted portions of a deposition, and; manipulated the jurors' minds by the frequent showings of the film of the incident. Plaintiffs also note that I rebuked defense counsel for other acts of misconduct.

The allegation that defense counsel misled the jury by quoting portions of a deposition falsely is unsubstantiated. The allegation that KUSA's videotape was played so often as to manipulate the jurors' minds is also without merit. In a motion in limine I ruled that KUSA's videotape was relevant evidence and was not prejudical to the plaintiff's case. My verbal rebukes of defense counsel are hardly grounds for a new trial. My role is to keep zealous advocates within clearly defined boundaries. The jury was instructed not to draw inferences against the side to whom an admonition was addressed during the trial. Jury Instruction Number 53. The contention that the admonitions constituted error is groundless.

IV. SUPPLEMENT TO "PRO SE" MOTION: NEWLY DISCOVERED EVIDENCE

[18] Appearing to be correctly captioned "pro se," the plaintiff Eduardo M. Lucero claims in his own behalf that newly discovered evidence (of past internal affairs complaints against former Denver Police Officer James Snyder and a criminal charge recently filed against Snyder) corroborate the plaintiffs' claim regarding Denver's policies and customs of harassing the Spanish surnamed community. The plaintiff also claims that the City and County of Denver concealed evidence of Snyder's behavior during the trial in order to limit its liability for damages.

This contention fails. No discovery request was ever made. Even if the reports of the Denver Police Department's

Staff Inspection Bureau had been requested, the SIB files of any investigation of Officer Snyder would first have to have been examined in camera. Under Martinelli v. District Court, 612 P. 2d 1083 (1980), and Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F. 2d 432 (10th Cir. 1981), the party seeking discovery of SIB files faces the police department's claims of irrelevance of the SIB files and the privileged nature of the communications contained in them. I was never asked nor did I ever examine SIB files in camera.

With regard to the criminal charges currently pending against Snyder, the alleged incident underlying those charges took place after the trial of this case and was, therefore, not

discoverable evidence in this case, was not relevant to the issues of the case and is not grounds for a new trial.

V. PLAINTIFFS' PRO SE MOTION TO DENY PLAINTIFFS' COUNSEL AN ATTORNEY'S LIEN

The motion is self-explanatory. in addition, plaintiffs recovered nothing. There is nothing upon which to impose an attorney's lien. The motion is granted.

IT IS ORDERED that:

1. Plaintiffs' motion for judgment n.o.v. is denied;

2. Plaintiffs' motion for a new trial filed by their attorneys is denied;

3. The plaintiffs "pro se" motion for a new trial, filed by plaintiff Eduardo Lucero, is denied; and

4. The pro se supplement to the latter motion for a new trial is denied.

5. Plaintiffs' motion to deny plaintiffs' counsel an attorney's lien is granted.

• • •

MAY TERM - July 3, 1986

Before Honorable James E. Barrett and Honorable James K. Logan, Circuit Judges, United States Court of Appeals

ROBERTO LUERA, Individually. et al.,	)	
Plaintiffs,	)	Nos. 85-1178, 85-1179, 85-1181, 85-1184, 85-1185, 85-1186, 85-1187, 85-1189, 85-1191
ELAINE SALAZ GONZALES, EDUARDO M. LUCERO, MARY LUCERO, RUDOLFO GONZALES, GERALDINE I. GONZALES, VAN S. LUCERO, GAIL LUCERO, NITA GONZALES, GINA ALVARADO,	)	
Plaintiffs-Appellants,	)	
v.	)	
OFFICERS JAMES "BUSTER" SNYDER, GORDON CHRISTTOPHER, CHESTER BRANNON, DAVID BRICKER, DANIEL REED, LESLIE L. JENKINS, LESLIE C. GEBHARDT, RICHARD FISHER, and THOMAS COOGAN, Chief of Police of the City and County of Denver, and the CITY AND COUNTY OF DENVER,	)	
Defendants-Appellees.	)	

This matter comes on for consider-

ation of appellees' motion to dismiss these appeals for failure of appellants to comply with Fed. R. App. P. 10, i.e., to order a transcript or to agree to a statement of the evidence or the record. We have long obliged pro se litigants to follow the rules. Bradenburg v. Beaman, 632 F. 2d (10th Cir. 1980), cert. denied, 450 U.S. 984 (1981).

Appellants were given twenty days to remedy their noncompliance with Fed. R. App. P. 10 and 11 and 10th Cir. R. 6 and 7, but have failed to do so.

Accordingly, these appeals are dismissed for failure to comply with 10th Cir. R. 15(a).

The mandates shall issue forthwith.

/s/ Robert L. Hoecker
Robert L. Hoecker, Clerk

DIVISION 2. PERMIT

Sec. 39-71. Required.

It shall be unlawful to hold any scheduled event within the parks of the city unless and until a permit therefor has been issued as provided in this division.

(Code 1950, § 311.1-1)

Sec. 39-72. Application.

Applications for permits to hold scheduled events shall be made to the manager of parks and recreation and shall contain the following information:

(1) The name, address and telephone number of the applicant;

(2) The name and address of any person sponsoring the event;

(3) The day and hours for which the permit is sought;

(4) The park or portion thereof for which such permit is desired;

(5) The names and addresses of any speakers:

(6) The nature and purpose of the event;

(7) An estimate of the anticipated attendance.

(Code 1950, § 311.2)

Sec. 39-73. Issuance; limitations on scope.

(a) The manager of parks and recreation shall issue said permit on the receipt of an application as set out in section 39-72, provided that:

(1) The facility desired has not been reserved for other use at the day and hour requested in the application; and

(3) The stated purpose is not to incite to violence or crime or the overthrow of the government by force;

ARTICLE II. SCHEDULED EVENTS

DIVISION 1. GENERALLY

APPENDIX 38

Sec. 39-61. Designated locations for sound amplification.

(a) The council hereby designates the Greek Theater in Civic Center and the City Park Pavilion in City Park as adequate and suitable places for holding of events that require sound amplification.

* * * * *

APPENDIX 39

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Civil Action No. 85-1179

EDUARDO M. LUCERO, et al.,
Appellant,

v.

JAMES "BUSTER" SNYDER, et al.,
Appellees.

NOTICE OF APPEAL

Notice is hereby given that Eduardo M. Lucero, pro se, the appellant in the above captioned action, hereby appeals to the Supreme Court of the United States from the dismissal of his appeal by the United States Court of Appeals for the Tenth Circuit entered on July 3, 1986.

By /s/ Eduardo M. Lucero
Eduardo M. Lucero
3410 West Alaska Place
Denver, Colorado 80219
(303) 922-7634

Filed on July 24, 1986

42 U.S.C. § 1983 CIVIL ACTION FOR DEPRIVATIONS OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985(3) CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

(3) If two or more persons in any State or Territory conspire or go in disguise guise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; * * * . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

AMENDMENT I OF THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people to peaceably assemble and to petition the Government for a redress of grievances.

AMENDMENT IV OF THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV OF THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of the laws; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL TREATY

THE TREATY OF GUADALUPE HIDALGO, SIGNED AT GUADALUPE HIDALGO ON THE 2d DAY OF FEBRUARY, 1848 IS THE TREATY OF PEACE, FRIENDSHIP, LIMITS, AND DEFINITIVE SETTLEMENT BETWEEN THE TWO REPUBLICS.

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories, after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans, not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guarantees equally ample as if the same belonged to citizens of the United States.

Article IX

The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States and be admitted, at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

THE PROTOCOL OF QUERETARO

The American Government by suppressing the IXth article of the Treaty of Guadalupe and substituting the IIId article of the Treaty of Louisiana did not intend to diminish in any way what was agreed upon by the aforesaid article IXth in favor of the inhabitants of the territories ceded by Mexico. Its understanding is that all of that agreement is contained in the IIId article of the Treaty of Louisiana. In consequence, all the privileges and guarantees, civil, political and religious, which would have been possessed by the inhabit-

ants of the ceded territories, if the IXth article of the Treaty had been retained, will be enjoyed by them without any difference under the article which has been substituted.

Trist and Scott, in accordance with the instructions which had been given them a year before, proceeded to negotiate peace. Mexico was to cede Texas, California, and the vast expanse of empty territory between them -- more than half the entire area of the Republic -- and was to recive fifteen million dollars, plus the cancellation of the unpaid claims. Threatened with a renewal of hostilities, Pena y Pena and a majority of the Mexican Congress gave their assent; and the terms were forwarded to Washington. Demands for American annexation of the whole Republic had been growing popular; but since the Treaty had been made, Polk decided to accept it. On March 10, 1848 the Treaty of Guadalupe Hidalgo was ratified by the American Senate, and by the last day of July the last American soldier had dearted from Mexico. Reprinted from Hunter Miller, ed., Treaties and Other Interntional Acts of the United States of America,Vol. 5, Wash., D.C.: Government Printing Office, (1937).

Supreme Court, U.S.
FILED
DEC 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 86-800

IN THE

Supreme Court of the United States

October Term, 1986

EDUARDO M. LUCERO, et al.,

Appellants,

v.

OFFICER JAMES "BUSTER" SNYDER, et al.,

Appellees.

MOTION TO DISMISS OR AFFIRM

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15 pp

QUESTION PRESENTED

Whether the Tenth Circuit Court of Appeals erred by dismissing appellants' appeal because appellants failed to obtain a transcript either by paying for it or by proceeding *in forma pauperis*.

PARTIES TO PROCEEDINGS BELOW

Original parties before the United States Court of Appeals for the Tenth Circuit: Elaine S. Gonzales, Rudolfo "Gorky" Gonzales, Eduardo M. Lucero, Eduardo D. Lucero, Mary L. Lucero, Cristobal Leis Yepes, Eddy Manuel Yepes and Reba L. Yepes, the appellants herein, and James H. Snyder, Richard Fisher, Thomas Coogan and the City and County of Denver, the appellees herein.

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No. 86-800

IN THE

Supreme Court of the United States

October Term, 1986

EDUARDO M. LUCERO, et al.,

Appellants,

v.

OFFICER JAMES "BUSTER" SNYDER, et al.,

Appellees.

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, appellees move to dismiss or affirm the appeal filed on behalf of appellants. The motion to dismiss is grounded on the fact that no proper question issuing from a circuit court has been presented pursuant to 28 U.S.C. § 1254. The motion to affirm is grounded on the fact that the question presented is so unsubstantial as not to need further argument.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 10(b)(2) provides that "[i]f the appellant intends to urge an appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion."

In its totality, Tenth Circuit Rule 15(a) states that "[w]hen an appellant acting *pro se* or through retained counsel in either a docketed or undocketed appeal fails to comply with the Federal Rules of Appellate Procedure or the Tenth Circuit Rules, the clerk shall notify the appellant that unless the default is remedied within ten days from the date of the notice, the appeal will be dismissed for want of prosecution. If the appellant fails to comply within the ten-day period, the clerk shall enter an order dismissing the appeal for want of prosecution, and shall issue a certified copy thereof as and for the mandate. The appellant shall not be entitled to remedy the default after the appeal is dismissed except by order of court."

In pertinent part, 28 U.S.C. § 1915(a) states that "[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith."

Finally, in pertinent part, 28 U.S.C. § 1254 provides that this Court has appellate jurisdiction over a circuit court "[b]y appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. . . "

STATEMENT

The jurisdictional issue posed by this appeal is the culmination of the following procedural developments in the Tenth Circuit:

1. Appellant Eduardo M. Lucero, who has taken the lead in the instant proceeding, was one of approximately 40 of the original 51 plaintiffs who individually appealed. He filed his Notice of Appeal with the Tenth Circuit on January 25, 1985. Eduardo M. Lucero paid the docket fee in appeal No. 85-1179 (Appendix A).

2. On June 27, 1985, the Clerk of the Tenth Circuit in the appeal of Elaine S. Gonzales, No. 85-1178, denied without prejudice her motion for the free trial transcript, and directed her to apply for such transcript in the first instance with the district court (Appendix B).

3. On January 13, 1986, the district court denied all appellants' motions for a free transcript of trial and held that there was "no merit to the appeal" (Appendix C).

4. The final ruling from the Tenth Circuit occurred on July 3, 1986, in which the Tenth Circuit dismissed the appeal pursuant to Tenth Circuit Rule 15(a) for failure to prosecute (Appendix D).

5. The basis for the dismissal by the Tenth Circuit Court of Appeals does not present a ground for review of a federal court's decision under 28 U.S.C. § 1254. Nonetheless, if this Court considers jurisdiction under *certiorari* review pursuant to 28 U.S.C. § 2103, jurisdiction should be denied because the question presented is so unsubstantial as not to need further argument.

ARGUMENT

The only record before the Tenth Circuit Court of Appeals was the opinion by District Court Judge John L. Kane, reprinted in the appendix attached to appellants' jurisdictional statement. The district court succinctly set forth the issues raised below, none of which concerns a question of importance to this Court. The questions concerned alleged impropriety in evidentiary rulings, the attorney's *voir dire* during jury selection, jury instructions that were not tendered, and rulings on motions for verdicts. In addition, appellants raised issues of whether the attorneys that plaintiffs chose in their civil action were so ineffective as to require a new trial, whether there was any evidence that the City had a policy of harrassing the Chicano community, whether a good faith defense is available in a claim under the civil rights act, and whether newly acquired evidence requires a retrial.

Appellants have made no showing that either the district court or the circuit court abused its discretion in denying appellants' motion for a free transcript. The trial court certified under 28 U.S.C. § 1915(a) that the appeal lacked merit and did not present a substantial question,

thus precluding a free transcript under § 1915(a). *See* Appendix C.

The government had no requirement to provide a free transcript in such a civil case and properly dismissed the case for lack of prosecution under Tenth Circuit Rule 15(a) (Appendix D). *See Maloney v. E. I. DuPont de Nemour & Co.*, 396 F.2d 939 (D.C. Cir. 1967). Because the facts do not raise any matter of importance, review should be denied.

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APPENDIX A

MAY TERM – June 27, 1985

Before Honorable James E. Barrett and Honorable James K. Logan, Circuit Judges, United States Court of Appeals

ROBERTO LUERA, individually, et al.,	)	
Plaintiffs,	)	
ELAINE SALAZ GONZALES, EDUARDO M. LUCERO, EDUARDO D. LUCERO, MARY LUCERO, RUDOLFO GONZALES,	)	Nos. 85-1178, 85-1179 85-1180, 85-1181 & 85-1184
Plaintiffs-Appellants,	)	
v.	)	
OFFICERS JAMES "BUSTER" SNYDER, GORDON CHRISTOPHER, CHESTER BRANNON, DAVID BRICKER, DANIEL REED, LESLIE L. JENKINS, LESLIE C. GEBHARDT, RICHARD FISHER AND THOMAS COOGAN, Chief of Police of the City and County of Denver, and the CITY AND COUNTY OF DENVER,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of defendants' motion to dismiss the captioned appeals and plaintiffs' response thereto. The motion is denied.

The grant of leave to proceed *in forma pauperis* in No.

85-1178 and the reinstatement of appeal Nos. 85-1180 and 85-1181 were orders entered by this panel, not by the clerk. *See* 10th Cir. R. 14. Contrary to counsel's belief, appeal No. 85-1179 was not "mistakenly never dismissed." A proper motion for leave to proceed *in forma pauperis* was submitted to his court. After the motion was denied, appellant paid the docket fee.

The order of reinstatement in appeal No. 85-1184, although entered by the clerk, was unopposed by defendants, who were advised of both the motion to reinstate and of the reinstatement two months before the motion to dismiss was filed. Furthermore, under the circumstances, the reinstatement is not without the jurisdiction of the clerk. 10th Cir. R. 13; Fed. R. App. P. 27.

HOWARD K. PHILLIPS, Clerk

APPENDIX B

MAY TERM – June 27, 1985

Before Honorable James E. Barrett and Honorable James K. Logan, Circuit Judges, United States Court of Appeals

ROBERTO LUERA, individually, et al.,	)	
Plaintiffs,	)	
ELAINE SALAZ GONZALES,	)	No. 85-1178
Plaintiff-Appellant,	)	
v.	)	
OFFICERS JAMES " BUSTER" SNYDER, GORDON CHRISTOPHER, CHESTER BRANNON, DAVID BRICKER, DANIEL REED, LESLIE L. JENKINS, LESLIE C. GEBHARDT, RICHARD FISHER AND THOMAS COOGAN, Chief of Police of the City and County of Denver, and the CITY AND COUNTY OF DENVER,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of plaintiff's motion for a free trial transcript. This court has granted plaintiff leave to appeal *in forma pauperis*.

The standard for directing payment of a transcript under 28 U.S.C. § 753(f) is not identical to that which permits the determination to grant leave to proceed on

appeal *in forma pauperis*. *Linden v. Harper & Rowe, Inc.*, 467 F. Supp. 556 (S.D.N.Y. 1979). Further, in the interest of judicial administration, the motion should be made in the first instance to the district court. *See Morrell v. United States*, 290 F.2d 208 (9th Cir. 1961); King v. Carmichael, 268 F.2d 305 (6th Cir. 1959), *cert. denied*, 361 U.S. 968 (1960); *Jaffe v. United States*, 246 F.2d 760 (2d Cir. 1959); *Ortiz v. Greyhound Corp.*, 192 F. Supp. 903 (D. Md. 1959).

The motion is accordingly denied, without prejudice.

HOWARD K. PHILLIPS, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 81-K-1386

ROBERTO LUERA, et al.

Plaintiff[s],

vs.

OFFICER JAMES "BUSTER" SNYDER, et al.,

Defendant[s].

MINUTE ORDER — JUDGE KANE

Judge John L. Kane, Jr. ORDERS:

Motion for Clarification Regarding Denial of Transcript is GRANTED. I have already ruled. My ruling is applicable to all plaintiffs.

1. There is no merit to the appeal.

2. There is no adequate showing of indigency.

3. There is no provision for the payment of transcripts in civil cases.

4. I am without jurisdiction to grant relief.

Mary Clark, Secretary DATE: January 13, 1986

APPENDIX D

MAY TERM – July 3, 1986

Before Honorable James E. Barrett and Honorable James K. Logan, Circuit Judges, United States Court of Appeals

ROBERTO LUEŔA, individually, et al.,	)	
Plaintiffs,	)	
ELAINE SALAZ GONZALES, EDUARDO M. LUCERO, MARY LUCERO, RUDOLFO GONZALES, GERALDINE I. GONZALES, VAN S. LUCERO, GAIL LUCERO, NITA GONZALES, GINA G. ALVARADO,	)	Nos. 85-1178, 85-1179 85-1181, 85-1184 85-1185, 85-1186 85-1187, 85-1189 85-1191
Plaintiffs-Appellants,	)	
v.	)	
OFFICERS JAMES "BUSTER" SNYDER, GORDON CHRISTOPHER, CHESTER BRANNON, DAVID BRICKER, DANIEL REED, LESLIE L. JENKINS, LESLIE C. GEBHARDT, RICHARD FISHER AND THOMAS COOGAN, Chief of Police of the City and County of Denver, and the CITY AND COUNTY OF DENVER,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of appellees' motion to dismiss these appeals for failure of appellants to comply with Fed. R. App. P. 10, *i.e.*, to order a transcript or to agree to a statement of the evidence or the record. We have long obliged pro se litigants to follow the rules. *Bradenburg v. Beaman*, 632 F.2d 120 (10th Cir. 1980), *cert. denied*, 450 U.S. 984 (1981).

Appellants were given twenty days to remedy their noncompliance with Fed. R. App. P. 10 and 11 and 10th Cir. R. 6 and 7, but have failed to do so.

Accordingly, these appeals are dismissed for failure to comply with 10th Cir. R. 15(a).

The mandates shall issue forthwith.

ROBERT L. HOECKER, Clerk

Supreme Court, U.S.
FILED
JAN 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-800

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

EDUARDO LUCERO, et al.,

Appellants,

v.

OFFICERS JAMES "BUSTER" SNYDER, et al.,

Appellees.

APPELLANTS' MOTION IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

EDUARDO MARRUJO LUCERO
APPELLANT, PRO SE
3410 West Alaska Place
DENVER, COLORADO 80219
(303) 922-7634

COME NOW the appellants, and move this Court to deny appellees' Motion to Dismiss or Affirm.

AS GROUNDS for this Motion, appellants submit the following:

1. Appellees' Motion to Dismiss or Affirm is based upon the fact that appellants have not ordered the trial transcript.

2. On January 6, 1986 appellants filed Motions in Opposition to Appellees' Motion to Dismiss in the Tenth Circuit Court of Appeals. See Exhibit "A." Appellants advised the Court that none of them could pay $6,000.00 for the trial transcript, and that:

> [t]he transcript is not of material effect to the District Court's judgment.

See Exhibit "A."

3. Appellants do not need the trial transcript itself because the errors are

in the case file, in the Judgment, and in the Opinion.

4. Appellees are not ordering the trial transcript even though they would need it to defend themselves against appellants' complaint. Appellees cannot afford to pull the transcript because it would substantiate the condemnatory facts which appellees are trying so desperately to suppress.

5. Appellees are not responsive to the true facts and issues of this case. Appellees are trying to subvert this case and suppress the facts, moreover, even if appellees want to argue the facts, they cannot do so because in doing so, they would have to admit their guilt.

THE FACTS

a. Appellees forcibly moved appellants out of the park to prevent their speech, and to break up their assembly.

b. Appellants did not resist, and

they moved out of the park without incident.

c. Appellees attacked appellants with dogs, tear gas, and clubs.

d. Appellees assaulted every person in sight in the neighborhood surrounding the park for four hours.

THE ISSUES

a. Appellees effectuated prior restraints on appellants' speech, press, assembly, association, expression, and liberty.

b. The trial court erred in its jury instructions.

c. The trial court erred in its comparative negligence instruction to the jury.

d. The trial judge committed embracery of the jury, in violation of the obstructing justice statute.

e. Negligence cannot be imputed to the appellants who were minor children.

f. Appellees wrongfully influenced the jurors' sensory awareness for countless hours by showing them a "doctored" video-tape over and over, and over again until they were sure the video-tape was in the jurors' individual memories.

The issues are set forth in more detail in appellants' Jurisdictional Statement.

WHEREFORE, appellants move this Court to deny appellees' Motion to Dismiss or Affirm, and for such other relief as this Court deems proper under the circumstances.

Respectfully submitted

Eduardo Marrujo Lucero

Eduardo Marrujo Lucero
3410 West Alaska Place
Denver, Colorado 80219
(303) 922-7634

CERTIFICATE OF MAILING

I hereby certify that I mailed 3 true and correct copies of the foregoing MOTION IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM, postage prepaid, this 14th day of January, 1987, to:

Theodore Halaby
1873 South Bellaire Street
1400
Denver, Colorado 80222

Eduardo M. Lucero

EXHIBIT "A"

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 85-1181

MARY L. LUCERO,

Plaintiff-Appellant,

v.

JAMES "BUSTER" SNYDER, et al.,

Defendants-Appellees.

APPELLANT'S MOTION IN OPPOSITION TO APPELLEES' MOTION TO DISMISS

COMES NOW the appellant, Mary L. Lucero, pro se, and moves this Court to deny Appellees' Motion to Dismiss.

AS GROUNDS for this Motion, Appellant submits the following:

1. Appellees' Motion to Dismiss is based upon the fact that appellant has not ordered the trial transcript, however, this appeal is based on legal arguments

and issues, hence, the transcript would add nothing because the transcript is not of material effect to the District Court's Judgment.

If Appellees wish to have the transcript, they may order it and pay for it themselves.

2. Appellees claim that Appellant has not agreed to a Statement of the Evidence, however, Appellees themselves have not sought a Statement of the Evidence, and Appellant is prepared to meet with Appellees to discuss a Statement of the Evidence.

3. The brief submitted by Appellant on December 2, 1985 is part of the record and there is no justifiable reason to strike it. Moreover, Appellees failed to timely file their Opening Brief and they are being evasive and using delaying tactics to avoid meeting the issues that

are confronting them by reason of Appellants's Brief.

4. No evidence of any negligence on the part of Appellant was presented, however, the negligence instruction was used to confuse the jury, and [it] was so prejudicial that it was plain error and it merits the most exacting judicial scrutiny. There is no testimony in the record upon which to predicate such an instruction against Appellant. The necessary effect was to confuse and mislead the jury, and the instruction is therefore prejudicial. Johnson v. Pennington, 150 S.W. 863 (1912).

The verdict in this action is not supported by the evidence. This is plain error, and it is highly prejudicial against Appellant. The plain error exception is narrow and is confined to the exceptional case (and this case is exceptional because the trial was miscarriage

of justice) in which error has affected seriously the fairness, integrity, or public reputation of judicial proceedings. Wright v. Farmers Co-op, 620 F. 2d 694 (8th Cir., 1980); Johnson v. Houser, 704 F. 2d 1049 (8th Cir., 1983).

5. This case merits the most careful scrutiny because the First Amendment is the very core of this Nation's fundamental constitutional freedoms.

6. The record in this case should be fully developed since this case involves long established customs and policies of racial animosity and pseudo-apartheid by the white majority population in Denver against Chicano citizens through acts of violence and terrorism perpetrated by Denver Police Officers against Chicano citizens as part of their official duties.

WHEREFORE, Appellant moves this

Court to grant the relief she is requesting in this Motion, that the District Court's decision be reversed, and that the case be remanded for retrial.

Respectfully submitted

/s/
Mary L. Lucero
Appellant, pro se
3410 West Alaska Place
Denver, Colorado 80219

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of January, 1986, a true and correct copy of the foregoing APPELLANT'S MOTION IN OPPOSITION TO APPELLEES' MOTION TO DISMISS was deposited in the United States mail, postage prepaid and addressed to the following addressees:

Mr. Theodore Halaby, and
Mr. Jonathan Cross
1873 South Bellaire St., #1400
Denver, Colorado 80222

/s/ Eduardo M. Lucero